

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Unbundled Access to Network Elements)	WC Docket No. 04-313
)	
Review of the Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange)	
Carriers)	

COMMENTS OF WORLDNET TELECOMMUNICATIONS, INC.

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WorldNet Telecommunications, Inc. ("WorldNet"), through its undersigned counsel, hereby respectfully submits the following comments in the above captioned docket.¹

I. SUMMARY

The facts in Puerto Rico clearly demonstrate that, whatever the state of competition in the rest of the country, the conditions supporting robust, irreversible facilities-based competition do not exist in Puerto Rico. Although it has been almost nine years since the passage of the Telecommunications Act of 1996 ("Act"), little progress has been made in introducing facilities-based competitive telecommunications services in Puerto Rico.² Rather, as the Telecommunications Regulatory Board of Puerto Rico ("Puerto Rico Board" or "Board") recently found in its investigation into enterprise switching impairment in Puerto Rico ("*Waiver*

¹ *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Doc. No. 04-313, CC Doc. No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179 (rel. Aug. 20, 2004) ("*TRO Remand NPRM*").

² 47 U.S.C § 151 et seq.; see Affidavit of Robert Walker at ¶ 16, attached hereto as Exhibit A ("*Walker Aff.*").

Petition Proceeding"),³ the telecommunication market in Puerto Rico is "more embryonic than corresponding markets on the mainland"⁴ and competitors attempting to gain access to the critical incumbent local exchange carrier ("ILEC") facilities necessary for the provision of ubiquitous facilities-based telecommunications services must contend with an incumbent with a "consistent track record of being unprepared, uninterested, and incapable of providing wholesale services as and when required or promised."⁵

Puerto Rico Telephone Company, Inc. ("PRTC" or "Incumbent"), the only incumbent carrier in Puerto Rico, is controlled by Verizon Communications, Inc. ("Verizon") and is the monopoly provider of local exchange services and access services and the dominant player in interexchange service in Puerto Rico.⁶ However, the protections of Section 271 of the Act, which were designed to condition the provision of long distance services by ILECs on, among other things, the provisioning of unbundled network elements ("UNEs") to competitors, have never been applied to PRTC, thereby affording it with unrestrained access to both the local and long distance markets in Puerto Rico without having to meet the market opening requirements of Section 271.⁷

Consequently, the growth of competition in Puerto Rico has been slower and less robust than on the mainland. As a matter of fact, Puerto Rico has only one active facilities-based

³ *FCC's Triennial Review Order, Review of High Capacity Business Customer Location Switching*, Before the Telecommunications Regulatory Board of Puerto Rico, Case No. JRT-2003-CCG-0004 ("*Waiver Petition Proceeding*").

⁴ *Waiver Petition of the Telecommunications Regulatory Board of Puerto Rico for Enterprise Switching Impairments in Defined Puerto Rico Markets*, CC Doc. Nos. 01-338, 96-98, 98-147, Order and Notice of Proposed Rulemaking, FCC 04-179, p. 5 (filed December 30, 2003) ("*Waiver Petition*").

⁵ *Waiver Petition* at 23.

⁶ *Walker Aff.* at ¶ 14.

⁷ 47 U.S.C. § 271(c)(2)(B); see *Authorization of Common Carrier Facilities to Provide Telecommunications Services Off the Island of Puerto Rico*, CC Doc. No. 86-309, Report and Order, 2 FCC Rcd. 6600 (1987) ("*PRTC Long Distance Order*").

CLEC,⁸ and, of the six companies that are certified by the Board to operate as resellers in Puerto Rico, WorldNet is the largest reseller and is believed to be the only active UNE-P provider with a locally-based sales and support staff.⁹ Moreover, San Juan ranks nearly last among major U.S. cities in terms of telecommunications competition despite its status as the 27th largest metropolitan statistical area in the United States.¹⁰ Indeed, while local competition has flourished on the mainland, it has languished on the island as the Incumbent continues to maintain a service monopoly throughout Puerto Rico.¹¹ PRTC operates approximately 1.3 million lines. In contrast, WorldNet operates approximately 45,000 lines, accounting a mere 3% of the local market.

The Commission must act upon the clear evidence of impairment that exists in Puerto Rico to keep the full spectrum of unbundled network elements, including mass market switching, available to competitors. Further, the Commission must retain a meaningful and continuing role for the Puerto Rico Board, which as the state regulator tasked by the Puerto Rico Legislature with opening the Puerto Rico market to competition,¹² deals with these issues on a day-to-day basis and is in the best position to understand the local market conditions in Puerto Rico. This action will allow the conditions necessary for the creation of sustainable facilities-based competition to develop in Puerto Rico.

⁸ Of the eight CLECs that are certified by the Board to provide telecommunications services, only one facilities-based CLEC, Centennial Puerto Rico License Corp Wireline ("Centennial"), is active in Puerto Rico. See *Walker Aff.* at ¶ 17.

⁹ *Id.*

¹⁰ *Id.* at ¶ 16.

¹¹ *Id.* at ¶ 20; See *Solicitud de Comentarios en Torno a Dominio de Mercado en la Prestacion de Servicios de Telecomunicaciones*, Case No. JRT-2000-CCG-0003, Resolution and Order on Reconsideration, 8 (Dec. 22, 2000); *Solicitud de Comentarios en Torno a Dominio de Mercado en la Prestacion de Servicios de Telecomunicaciones*, Case No. JRT-2000-CCG-0003, Resolution and Order, 9 (Sept. 6, 2000), (collectively "*Market Power Orders*").

¹² Puerto Rico Law 213, Approved Sept. 12, 1996, Statement of Motives ("*Law 213*") (giving the Telecommunications Regulatory Board of Puerto Rico the task of, among other things, promoting facilities based competition in Puerto Rico).

II. BACKGROUND

Headquartered in San Juan, Puerto Rico, WorldNet is a relatively small company, currently employing about 70 people, with operations only in Puerto Rico. WorldNet has no affiliations with any other company. WorldNet currently provides local and long distance telephone and data services to customers throughout Puerto Rico. To date, WorldNet has expended significant resources and made considerable economic investments in the Puerto Rico market. Indeed, WorldNet has for the past five years made the substantial commitment necessary to develop the organization, back office, sales, marketing, and regulatory systems and processes required to offer its customers state of the art telecommunications services with a level of service and quality above and beyond that offered by the Incumbent. WorldNet is in the last phase of completing its state-of-the-art OSS that will be the most advanced web-based service system in Puerto Rico. This system will allow Puerto Rico customers the unprecedented efficiency of ordering service and reporting trouble over the Internet without even making a call.

Initially, WorldNet provided its services exclusively through resale. However, WorldNet's business plan has always anticipated migrating its resale services to UNE-P and ultimately, if and when the necessary conditions are in place, such as ability to efficiently collocate switches and perform hot-cuts, migrate these circuits to its own switch. Within the last year, WorldNet has started the first step in this migration process by moving its resale circuits to UNE-P.¹³ WorldNet is also in the planning stages of its facilities-based deployment, and is scheduled to deploy its first facilities in Fall 2005. However, the success of this deployment is dependent upon the Incumbent providing meaningful and efficient interconnection as well as provisioning of necessary inputs, such as, at a minimum, loops, cross connects, transport,

¹³ WorldNet relied on this fundamental linchpin of the Congressional menu of local competition options under the Act. WorldNet looks to UNE-P as a transition strategy to a more facilities-based approach.

collocation, signaling and number portability in a reliable manner. Without these critical elements - or without a viable combination of UNEs including, switching, loops and transport (e.g., UNE-P) -- WorldNet may no longer be in a position to serve its customer base in Puerto Rico.

Due to persistent lack of cooperation from PRTC, even accomplishing this initial migration from resale to UNE-P has taken years and has required that WorldNet expend considerable energy, resources, and money.¹⁴ It also has required, among other things, filing formal complaints¹⁵ and arbitration of interconnection agreements with the Board under section 252 of the Act.¹⁶ However, many core problems still remain, including the Incumbent's complete lack of any operational experience providing loops, cross-connects and hot-cuts, acute and persistent problems with providing timely access to collocation as well as an inability to deliver accurate billing, ordering and preordering information.¹⁷ And WorldNet anticipates that due to the increased technical complexity involved, obtaining the level of wholesale services necessary to accomplish a migration to UNE loops ("UNE-L") will prove even more difficult than the migration from resale to UNE-P.

Access to UNEs, including UNE switching (both mass market and enterprise), remains essential if the conditions necessary for viable facilities-based competition are ever going to take root in Puerto Rico. In light of the absence of any significant CLEC deployment of local

¹⁴ *Walker Aff.* at ¶ 10.

¹⁵ See *WorldNet Telecommunications, Inc., Plaintiff v. Puerto Rico Telephone Company, Inc., Respondent*, Case No. JRT-2003-Q-0174; *WorldNet Telecommunications, Inc., Plaintiff v. Puerto Rico Telephone Company, Inc., Respondent*, Case No. JRT-2003-Q-0143; *WorldNet Telecommunications, Inc., Plaintiff v. Puerto Rico Telephone Company, Inc., Respondent*, Case No. JRT-2002-Q-0076 (2003).

¹⁶ See *Petition of WorldNet Telecommunications, Inc., Petition for Arbitration Pursuant to Section 47 U.S.C. 252(b) of the Federal Communications Act and Section 5(b), Chapter III, of the Puerto Rico Telecommunications Act, Regarding Interconnection Rates, Terms and Conditions with Puerto Rico Telephone Company, Inc.*, Docket No. JRT-2003-AR-0001 (2004).

¹⁷ *Waiver Petition* at 20.

switching, CLECs in Puerto Rico do not now have an alternative to the Incumbent's switching for providing services.¹⁸ In fact, CLECs have deployed only three percent of the local switches in Puerto Rico, and there is only one switched-based CLEC in the entire Commonwealth.¹⁹ Furthermore, as of January of this year, not one CLEC in Puerto Rico was providing switched services using UNE-L,²⁰ and the only CLEC to deploy its own switches on the islands had to wait over three years to have a single collocation space delivered.²¹ These obvious operational impairments on their own amply justify a finding by the Commission that CLECs are impaired without access to UNE facilities in Puerto Rico.

III. DISCUSSION

A. Revisions Are Necessary to the Commission's Impairment Analysis to Comply with *USTA II*.

The *TRO Remand NPRM*, among other things, seeks comment on the necessary changes to the Commission's unbundling framework, given the guidance of the U.S. Court of Appeals for the D.C. Circuit's decision in *USTA v. FCC II*,²² ("*USTA II*"). In *USTA II*, the Court vacated certain unbundling rules promulgated by the Commission in its *Triennial Review Order*²³ on the grounds that the Court believed that the Commission impermissibly delegated to the states final

¹⁸ *Waiver Petition* at 15 - 16.

¹⁹ *Id.* at 16.

²⁰ *Id.* at 17. It is WorldNet's understanding that PRTC may have commenced providing very limited UNE-L services to Centennial approximately six months ago. However, even this limited provisioning took over three years to accomplish.

²¹ *Id.* at 21 - 22.

²² 359 F.3d 554 (D.C. Cir. 2004).

²³ *Triennial Review Remand NPRM* at ¶15; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos., 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), corrected by Errata, 18 FCC Rcd 19020 (2003).

decision-making authority granted by Congress exclusively to the Commission.²⁴ The Court further ruled that the Commission cannot delegate the authority to make final determinations regarding UNE availability to the states. Rather, the Commission must remain the ultimate arbiter of these issues. However, state commission can play a vital role in such areas as market definition and the development of a factual record as to whether competition is impaired without access to a particular UNE in a given market. State commissions are well suited to fulfill this fact-finding role given their inherent familiarity with localized competitive conditions. Nevertheless, any such factual determinations should be subject to periodic review by the Commission, given the highly dynamic nature of the telecommunications competitive marketplace.

In the *Triennial Review Order* the Commission recognized the importance of state commissions as the regulators with the closest ties to particular markets to fulfilling its objectives regarding UNEs and endeavored to give the states a central and continuing role in implementing these objectives.²⁵ While the Court in *USTA II* ultimately struck down the method the Commission employed to achieve its goal of state involvement in determining UNE availability, the ends it sought to achieve were nonetheless appropriate and in keeping with the goals of the Act. Indeed, the Act expressly recognizes the critical role that state commissions play in

²⁴ *USTA II*, 359 F.3d at 568. Specifically, the Court vacated the Commission's rules governing mass market switching and dedicated transport after finding that, absent the facts that the Commission had directed the state commissions to determine, the Commission did not make a sufficiently granular factual determination in keeping with the requirements of the Court's prior ruling in its 2002 decision in *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"). *USTA II*, 359 F.3d at 568 - 571, 574. And, although the Court did not specifically vacate the Commission's rules regarding high capacity enterprise loops, it did create significant uncertainty with regard to the legality of the Commission's enterprise loop rules. See *TRO Remand NPRM* at ¶ 1 n. 6.

²⁵ See *Triennial Review Order* at ¶ 191 *et seq.*

developing a competitive market for local telecommunications services and expressly preserved an active role for states.²⁶

With these general principles in mind, WorldNet proposes the following modifications to the Commission's unbundling procedures. First, the Commission should make a prompt determination regarding the availability of UNEs in specific geographic locations to the extent relevant facts are submitted in this proceeding. Thereafter, state commissions should have the opportunity to perform the fact-finding function in the process of determining UNE availability. However, the Commission must recognize that some state commissions may be unwilling or unable to fulfill this role. Accordingly, WorldNet proposes an approach analogous to the jurisdiction to resolve pole attachment complaints under Section 224(c) of the Communications Act.²⁷ Under this approach, any state commission should be authorized to issue findings of fact in connection with an impairment showing upon certification to the Commission that the state Commission:

- 1) Is ready and willing to consider impairment petitions filed by any CLEC operating within that state;
- 2) Is prepared to conduct appropriate fact-finding proceedings to develop a record on such localized, granular market conditions as the Commission might specify; and
- 3) Commits to submit its written findings of fact on all relevant issues to the Commission within 120 days after a party files its petition with the state commission.

Any such factual record developed by the state commissions would be submitted to this Commission, which would have final authority to issue an unbundling order within 60 days thereafter. In cases where the state commission is not certified to make such factual

²⁶ See, e.g., 47 U.S.C. §§ 251(d)(3), 252(b).

²⁷ 47 U.S.C. § 224(c).

determinations, carriers could file their unbundling petitions directly with the Commission, and it should commit to resolve such petitions within 180 days.

B. The Existing Factual Record Supports Impairment Findings in Puerto Rico.

While the Court specifically found that the Commission had not conducted the market-specific analysis required under *USTA I*, it did not find fault with the criteria and analysis the Commission employed in making the general findings based on the limited factual record at its disposal. Rather, the Court found fault with the Commission making a national finding based upon a mixed record that it believed the Commission itself implicitly understood "could not support an undifferentiated nationwide impairment finding."²⁸ Further, while the Court did not rule on the Commission's definition of impairment, it generally found that the definition was sufficient to the extent that it plausibly connects factors related to natural monopoly characteristics, including "operational barriers to entry within the sole primary control of the ILEC."²⁹ Nor did the Court find fault with the Commission's treatment of intermodal alternatives.³⁰ In sum, the Court noted that the Commission's definition "finds concrete meaning only in its application"³¹

The facts relating to the impairment competitors face without access to UNE switching, transport, high capacity loops and entrance facilities in Puerto Rico are clear an overwhelming based upon even the *minimal* criteria that the Commission has previously employed and that has not been disturbed by the courts. The Commission should apply this same analysis to the facts pertaining to Puerto Rico to reach the unavoidable conclusion that competitors in Puerto Rico are

²⁸ *USTA II*, 359 F.3d at 570.

²⁹ *Id.* at 572 (citation omitted).

³⁰ *Id.* at 572 - 73.

³¹ *Id.* at 572.

impaired without access to the full array of UNEs previously made available by the Commission and made available by ILECs on the mainland. There is probably no clearer case of impairment anywhere based upon just these minimal standards.

1. Puerto Rico is a Distinct Market with Unique Market Conditions.

The D.C. Circuit in both *USTA I* and *USTA II* has directed the Commission to review the issue of UNE availability on a geographic market basis.³² Regardless of any changes implemented by the Commission to its general unbundling framework in response to the *USTA II* decision, WorldNet submits that a compelling and dispositive factual record has already been developed to demonstrate the unique circumstances present in the Puerto Rico telecommunications market and how competitors serving the Puerto Rico market will be impaired by the removal of any of the constituent local network elements that comprise UNE-P, transport and high capacity loops and entrance facilities.

Puerto Rico is unique in comparison to geographic markets on the mainland for the fundamental reason that it is an island and therefore is more isolated and less developed.³³ There are a limited number of telecommunications facilities available in Puerto Rico and few or no CLECs with whom a competitor can interconnect.³⁴ Further, as the Board found in its *Waiver Petition*, the Puerto Rico market does not have a robust secondary market to supply the necessary telecommunications support and facilities that competitors need to compete, such as vendors, consultants, technical experts, and other critical resources that are readily available in other jurisdictions.³⁵ Indeed, evidence demonstrates that no such secondary market exists in Puerto Rico. Because of Puerto Rico's isolation and distance from other centers of commerce,

³² *USTA I*, 290 F.3d at 422; *USTA II*, 359 F.3d at 563.

³³ *Walker Aff.* at ¶¶ 15, 21.

³⁴ *Id.* at ¶ 20.

³⁵ *Waiver Petition* at 24.

competitors operating in Puerto Rico face costs associated with importing the specialized equipment and services necessary to construct and operate their businesses that are not encountered by competitors on the mainland.³⁶

Puerto Rico is also unique in that the incumbent provider, PRTC, was formerly a government-owned entity and was only privatized four years ago. PRTC's service is generally inferior in quality to that in other areas of comparable size.³⁷ For example, it takes an average of 10 days to install a basic POTS line and three to four days to repair one. High cap circuits take an average of 45 to 60 days to install if there are facilities available. If no facilities are available, delays of up to one year are common.

In addition, PRTC still maintains many of the characteristics of a vertically integrated monopoly.³⁸ The Incumbent's market share dwarfs the shares of all of its other competitors combined. The Incumbent provides lines to ninety-seven percent (97%) of the residential and business customers in Puerto Rico.³⁹ The CLEC market is virtually split between only two competitors, WorldNet and Centennial.

Further, PRTC was granted the ability to provide long distance services in 1987⁴⁰ and was never subject to the market opening requirements of Section 271, even though it was subsequently bought by Verizon in 2000.⁴¹ No less authority on the subject than the Puerto Rico Board has recently found that the market in Puerto Rico is "more embryonic than corresponding

³⁶ *Walker Aff.* at ¶¶ 15, 21.

³⁷ *Walker Aff.* at ¶ 24.

³⁸ *Market Power Orders* supra n. 11; *Walker Aff.* at ¶ 20.

³⁹ *Walker Aff.* at ¶ 18.

⁴⁰ *PRTC Long Distance Order* supra n. 7.

⁴¹ *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket 98-184, Memorandum Opinion and Order, FCC 00-221, 15 FCC Rcd 14032 (2000).

markets on the mainland."⁴² For this reason, the Commission must treat the market in Puerto Rico as its own market, separate and distinct from markets on the mainland.

Because the primary cause of impairment within the Puerto Rico market stems from PRTC's use of its market power to create operational barriers to competitive entry, the specific geographic market definition within the Puerto Rico Market does not significantly affect the outcome of an impairment analysis.⁴³ This is because, at its core, the chief impairment competitors face stems from their inability to obtain access to critical facilities controlled by the monopoly carrier -- PRTC. With PRTC controlling these facilities throughout the island, there are currently no geographic areas within Puerto Rico where competitors are more or less likely to receive these services than in any other area. Simply put, competitors cannot access these facilities anywhere on the island. As the Board noted in its Waiver Petition, the separation of Puerto Rico into distinct markets "effectively does not matter."⁴⁴

At a minimum, WorldNet believes that the Commission must treat Puerto Rico as its own separate and unique market for purposes of its UNE impairment analysis under Section 251. Beyond this, WorldNet believes that it is unnecessary to subdivide the Puerto Rico market for purposes of the Commission's analysis here, as it would unnecessarily complicate the analysis without providing any corresponding benefit in the clarity of the result. However, to the extent that the Commission feels that it must do so, WorldNet believes that the market definition used by the Board in the Waiver Petition is acceptable. Specifically, the Board "found that the most appropriate market definition within Puerto Rico is one that identifies three specific markets for three distinct metropolitan areas: San Juan, Ponce, and Mayaguez; and one comprising the rural

⁴² *Waiver Petition* at 5.

⁴³ *See Waiver Petition* at 14.

⁴⁴ *Id.* at 14.

portions of [Puerto Rico]."⁴⁵ But even if subdivided into four markets, the record is clear that competition is equally impaired throughout Puerto Rico.

2. The Commission Should Give Substantial Weight to the Findings of the Telecommunications Regulatory Board of Puerto Rico.

In the *Triennial Review Remand NPRM* the Commission requested that the parties to this proceeding file summaries of the state proceedings undertaken pursuant to the *Triennial Review Order*.⁴⁶ For Puerto Rico, the Commission has available to it not only a summary of the proceeding, but an actual finding by the Puerto Rico Board that competitors are impaired without access to switching for serving enterprise customers.⁴⁷ Puerto Rico is the only jurisdiction in the entire country to complete the monumental task of conducting a full investigation into the level of impairment competitors face in providing services to enterprise customers without access to UNE switching, and file a petition with the Commission seeking a waiver of its enterprise switching rules for Puerto Rico.⁴⁸ In the *Waiver Petition* the Board found clear and convincing evidence of systemic and pervasive operational impairments in Puerto Rico.⁴⁹ These findings were developed through a full evidentiary proceeding in which each party's due process rights were assured and included discovery, direct and reply testimony, cross examination of witnesses, and a hearing before the Board. Further, the facts considered and much of the analysis applied by the Board in reaching its conclusion are directly relevant to the Commission's inquiry here regarding mass market switching, high capacity transport and loop UNEs. For these reasons, the

⁴⁵ *Waiver Petition* at ¶13.

⁴⁶ *Triennial Review Remand NPRM* at ¶15; *Triennial Review Order*, 18 FCC Rcd 16978.

⁴⁷ See *Waiver Petition* supra n. 4; see also *Wireline Competition Bureau Seeks Comment on Waiver Petition Filed By the Telecommunications Regulatory Board of Puerto Rico for Enterprise Market Switching Impairment*, CC Doc. Nos. 01-338, 96-98, 98-147, Public Notice, DA 04-7 (rel. Jan. 9, 2004) .

⁴⁸ See *Waiver Petition* supra n.4.

⁴⁹ *Id.*

Commission should accord the findings of the Board in the *Waiver Petition* substantial weight and deference.

As requested in the *Triennial Review Remand NPRM*,⁵⁰ the Board's *Waiver Petition* and select materials from the state-level proceeding that led to the Board's *Waiver Petition*⁵¹ are attached.

3. Competitors Are Impaired Without Access to Mass Market Circuit Switching in Puerto Rico.

In order for competitors to be able to provide services to end-users in Puerto Rico, over the long term, they must be able to successfully implement a viable business plan relying upon facilities-based competition in whole or in part. In order to implement even partial facilities-based competition, CLECs must be able to gain access to poles, conduits, rights of way, signaling, databases, numbering resources, and number portability; interconnect their facilities with those of the incumbent; and they must be able to purchase transport, collocation, cross connects, and UNE loops from the incumbent.

Because of the significant, and nationally unprecedented, operational problems associated with obtaining access to loops in Puerto Rico, competitors seeking access to PRTC's loops currently have no option other than using PRTC's local switching to gain meaningful access to mass market customers.⁵² These operational difficulties, which were clearly established in the Board Waiver Proceeding, include a specific inability to obtain cross connects and collocation and a demonstrated track record of general difficulties in getting PRTC to live up to commitments to provide wholesale services to competitors.⁵³ Due to these operational barriers,

⁵⁰ *Triennial Review NPRM* at ¶ 15.

⁵¹ *Waiver Petition Proceeding* supra n. 3.

⁵² *Walker Aff.* at ¶ 20.

⁵³ *Waiver Petition* at 19 - 22.

competitors in Puerto Rico are impaired within the meaning of Section 251 without access to unbundled switching to serve mass market customers.

In the *Triennial Review Order*, the Commission made a national finding that competitors are impaired without access to switching for serving mass market customers due primarily to the difficulties they face regarding ILEC hot cut procedures.⁵⁴ Specifically, the Commission found "that a seamless, low-cost batch hot cut process for switching mass market customers from one carrier to another is necessary, *at a minimum*, for carriers to compete effectively in the mass market."⁵⁵ The Court in *USTA II* did not find fault with the Commission's analysis in reaching this conclusion.⁵⁶ Rather, the Court held that the Commission could not make a national finding of impairment where it was clear from the record that the conditions regarding hot cuts which the Commission relied upon did not exist in all geographic areas throughout the country.⁵⁷

Nothing has changed since the issuance of the *Triennial Review Order* that would call into question the Commission's thorough analysis regarding the importance of batch hot cut procedures for switched based competition.⁵⁸ The Commission's determination that an ILEC's ability to provide hot cuts is a minimum requirement for a finding of impairment under Section 251 of the Act is still appropriate from both a legal and policy perspective. Accordingly, the Commission should use this same analysis in making its own market-specific analysis of impairment in Puerto Rico.

The facts showing impairment without access to mass market switching in Puerto Rico are clear and convincing -- this is not even a close case. Not only does PRTC not have a batch

⁵⁴ *Triennial Review Order* at ¶ 487.

⁵⁵ *Id.* at ¶ 478 (emphasis added).

⁵⁶ *USTA II*, 359 F.3d at 570.

⁵⁷ *Id.*

⁵⁸ *See Triennial Review Order* at ¶¶ 464 - 475.

hot cut process as described by Commission in the *Triennial Review Order*, PRTC had, as of January of this year, never provided *even a cross connect*, let alone the mass batch hot cuts that are so widely available from ILECs on the mainland.⁵⁹ Competitors in Puerto Rico do not have the luxury of debating the nuances regarding the exact batch hot cut performance metrics and the economic implications of various rate structures that the Commission considered in the *Triennial Review Order*.⁶⁰ Rather, as of at least January of this year, not one competitor has successfully obtained a loop as UNE in Puerto Rico.⁶¹ And PRTC does not even have a draft procedure to provide a hot cut.

Indeed, after developing a full record on PRTC's ability to provision UNE loops to a competitor's switch, including a hearing with and cross-examination of witnesses, the Board determined that it would be "unrealistic" to expect PRTC to provide the services necessary for a competitor with a switch to access loops without difficulties and delays even under the best of circumstances.⁶² Moreover, as the Board pointed out,

[t]he record reveals beyond this, however, that PRTC's case does not involve the best circumstances. Rather, the record demonstrates a track record of PRTC wholesale service failures (including specific collocation failures) that make PRTC's claims of instant and unprecedented competence even less credible. Indeed, this documented track record includes instances where even after two to four years of experience and opportunity, PRTC has failed to devote the resources or attention necessary to provide even the most basic services and facilities without substantial operational problems.⁶³

The Board concluded that

⁵⁹ *Waiver Petition* at 20 n. 26 (citing Correa Direct Testimony at 8).

⁶⁰ *See e.g. Triennial Review Order* at ¶¶ 468-475.

⁶¹ *Waiver Petition* at 20.

⁶² *Waiver Petition* at 20.

⁶³ *Id.* at 21.

it is difficult to envision any stronger showing of an operational barrier than an ILEC that has absolutely no experience in successfully providing stand alone UNE loops or cross-connects and very limited experience in providing collocation. Indeed, perhaps the only possibility to have a stronger showing is to have a record in which the ILEC not only does not have any successful experience, but actually has negative experiences in providing these services and a consistent track record of being unprepared, uninterested, and incapable of providing wholesale services as and when required or promised. Such is the finding the Board makes regarding the Puerto Rico Markets.⁶⁴

a. There Has Not Been a “Significant” Deployment of Local Wireline Switches by CLECs in Puerto Rico.

The conclusion reached by the Board regarding the impairments competitors face in Puerto Rico, and the facts that supported this conclusion, should be enough for the Commission to find that competitors are impaired without access to mass market UNE switching in Puerto Rico. However, over and above this conclusion regarding the operational barriers competitors face in Puerto Rico, the facts regarding switch deployment and the general state of competition in Puerto Rico leave no room for doubt that competitors are impaired without access to mass market switching in Puerto Rico. The impact that PRTC's failure to comply with even the most basic unbundling obligations has had on competition in Puerto Rico is apparent when reviewing the facts and stands as an object lesson in support of the Commission's focus on loop provisioning in conducting its impairment analysis.

In the *Triennial Review Order*, the Commission concluded that evidence of actual switch deployment in a market served to show that competitors are not impaired with regard to access to mass market switching in a given market.⁶⁵ The Commission reasoned that "the presence of

⁶⁴ *Id.* at 23.

⁶⁵ *Triennial Review Order* at ¶ 498.

facilities-based competition is the best indicator that requesting carriers are not impaired."⁶⁶

Based on this analysis, the demonstrated track record with regard to actual deployment of switching and other facilities in Puerto Rico further supports the conclusion that competitors are impaired without access to mass market switching in this market. Specifically, the record in this case reflects that PRTC owns all but four (4) of the one hundred and eight (108) local service switches currently installed and operating anywhere in Puerto Rico.⁶⁷ This is less than three percent of the switches in Puerto Rico. Moreover, the four Class V CLEC switches in Puerto Rico are all for wireless services and are owned by a single CLEC, Centennial,⁶⁸ and it does not make these switches available for competitive access to UNE loops. Centennial uses three of these four switches primarily for wireless customers.

In the *Triennial Review Order*, the Commission determined that the states must conclude that there is no impairment in any market where three (3) competitive providers have deployed switches in a particular market or two competitive providers make switches available on a wholesale basis.⁶⁹ These criteria are not met in Puerto Rico even when the entire Commonwealth is considered a single market because only one CLEC has deployed its own switches in the whole of Puerto Rico.⁷⁰

Further, as the Commission acknowledged in the *Triennial Review Order*, without access to a meaningful batch hot cut process, access to switching will remain necessary in Puerto Rico.⁷¹ In the *Triennial Review Order*, the Commission stated that "[w]e believe that [the

⁶⁶ *Id.*

⁶⁷ *Waiver Petition* at 16.

⁶⁸ *See* Centennial Response to Board Initial Information Request II.2.

⁶⁹ *Triennial Review Order* at ¶¶ 501, 504 - 505.

⁷⁰ *Waiver Petition* at 16.

⁷¹ *Triennial Review Order* at ¶ 502.

impairment that requesting carriers experience due to inadequate hot cuts] is unlikely to change until incumbent LECs implement batch hot cut processes."⁷² The Commission continued that "in light of the batch hot cut processes we are requiring the states to approve and implement, we believe that competitive carriers will likely begin to utilize self-provisioned switches in greater numbers going forward."⁷³

As established in detail above, not only does PRTC not have a batch hot cut process, it had until very recently never provided even a single cross connect. Because of the significant and persistent operational barriers competitors face in Puerto Rico, WorldNet urges the Commission to take the actions necessary to ensure that switching remains available in Puerto Rico until PRTC has an *actual demonstrated ability* to perform batch hot cuts. Currently, PRTC has not even priced a hot cut much less "batch" hot cuts. Nor is there any record evidence supporting PRTC's claim that it is "ready, willing and able;" the Commission should discount any such a claim. Without Commission action, switch deployment in Puerto Rico will be completely meaningless because of the inability to connect switches to UNE loops.

b. There Is No Meaningful UNE-L Competition in Puerto Rico.

In addition to the fact of low switch deployment in Puerto Rico, the record developed in the Board's *Waiver Petition Proceeding* reflects that CLECs in Puerto Rico are not able to compete successfully in providing switched services via collocation and backhaul transport (i.e., UNE-L). In fact, they are not competing at all. The record in the Board's *Waiver Petition Proceeding* indicates that as of January 2004 not one CLEC in Puerto Rico was providing switched services using UNE-L.⁷⁴ Indeed, the only CLEC to deploy its own local switches in

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Waiver Petition* at 17.

Puerto Rico (i.e., Centennial) had to fight with PRTC for over three years in order to obtain the collocation necessary for a UNE-L based service platform and only very recently received its first collocation space.⁷⁵ Achieving even this limited milestone required a formal complaint filed with the Board.⁷⁶ In the complaint, Centennial reported that PRTC failed to meet a July 2003 interconnection agreement deadline for a number of Centennial collocation orders and that other Centennial collocation orders have been pending with PRTC for over three years.⁷⁷ Centennial commented on the record in the Board's Waiver Proceeding that despite its settlement of its complaint against PRTC, the collocation process devised by PRTC is still "highly problematic" and that "many issues remain."⁷⁸

PRTC has proven itself to be unwilling and unable to provide wholesale services to competitors in a commercially reasonable manner. For example and as the record in the Board's *Waiver Petition* proceeding reveals, in 2001 PRTC committed to be "ready, willing, and able" to make UNE-P available in Puerto Rico by October 1, 2002.⁷⁹ This was almost a year later than initially promised and over six years after it was first required by federal law to do so. However, on October 1, 2002, PRTC could not and did not provide UNE-P.⁸⁰ Although PRTC did accept and process initial UNE-P orders, it did not have the processes or systems in place to provision these services appropriately.⁸¹ Instead, PRTC rushed orders through a makeshift, problematic procedure fraught with errors and only when faced with a complaint filed by WorldNet. In fact,

⁷⁵ See Bogaty Rebuttal Testimony at 3 (lines 5-11) (relying on *Centennial Puerto Rico License Corp. v. PRTC*, Request for Emergency Order and Complaint, Case No. JRT-2003-Q-0070 (filed May 13, 2003) ("*Centennial Complaint*").

⁷⁶ *Centennial Complaint* supra n. 91.

⁷⁷ See Bogaty Rebuttal Testimony at 3 (lines 5-11) (relying on *Centennial Complaint*).

⁷⁸ *Waiver Petition* at 22.

⁷⁹ *Waiver Petition* at 22.

⁸⁰ *Id.*

⁸¹ *Id.*

WorldNet's orders are still plagued with significant and costly process breakdowns, including completely unnecessary disconnection of end user customers, widespread and recurring billing errors, and a billing system that, according to PRTC, was (and still is) not yet configured to charge WorldNet based on WorldNet customers' actual usage of UNE-P lines.⁸²

Two unresolved problems stand out. First, PRTC uses a makeshift code to internally transfer a circuit to UNE-P which is the same as the code for disconnects. As a result, WorldNet cannot tell the difference between a PRTC disconnect and a transfer. Even PRTC internally confuses these codes and inappropriately shuts customers' service down as a result. Second, PRTC still uses an inaccurate, temporary composite rate developed by WorldNet three years ago to invoice local switching. PRTC has made no perceptible effort to correct this persistent billing error.

Given this record, it is not surprising that the Board found that the record reveals that PRTC has had four years of experience in providing resale services to WorldNet.⁸³ Yet, despite continuing WorldNet complaints, meetings, and PRTC promises, PRTC is providing bills to WorldNet that require, according to WorldNet, it to make approximately 5,000 manual adjustments each month and, in some cases, reflect errors that have been included on every WorldNet bill for the past four years.⁸⁴ Even worse, several of the errors remain indecipherable and unexplained by PRTC after four years.

In sum, any national finding regarding "significant" CLEC switch deployment, and "successful" UNE-L based competition has absolutely no basis in fact in Puerto Rico and any such finding should not be applied to this market.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* (citing Bogaty Direct Testimony at 4 (lines 4 - 10)).

**c. PRTC Is Not Ready or Able to Provide Other Services
Necessary for CLEC Switch Deployment.**

Over and above the operational barriers discussed above relating to UNE provisioning, there are other operational barriers to competitive entry in Puerto Rico that warrant a finding of impairment without access to mass market UNE switching. This evidence of operational barriers again reflects problems created by PRTC's inexperience and its history of ignoring service obligations. For example, the record indicates that PRTC is not providing local number portability to CLECs in Puerto Rico; as the Board noted in the *Waiver Petition*, "[l]ocal number portability is a vital and necessary component to CLEC switch deployment, and it is an obligation and issue that PRTC has largely ignored."⁸⁵

Similarly, the record indicates that PRTC has little to no experience in cooperating with competitors to gain or share access to necessary easements or rights-of-way provided by third parties.⁸⁶ Quite simply, without this experience in joint provisioning and in the absence of any existing service commitments or processes, PRTC remains in a position to frustrate CLEC efforts to deploy facilities and create additional operational barriers to competitive market entry.

**d. The Likely Revenues for CLEC Entry Into Puerto Rico
Markets Are An Economic Barrier.**

In addition to the operational barriers competitors face in Puerto Rico, the record also establishes an economic barrier in that likely revenues would not justify CLEC service to the Puerto Rico mass market without access to PRTC switching, transport and high capacity loop and entrance facilities. In summary, this record established that a CLEC would need to add at least 200 DS1s per month (which amounts to 4,800 loops) to economically justify the

⁸⁵ *Waiver Petition* at 24.

⁸⁶ See Bogaty Direct Testimony at 5 (lines 34-37).

deployment of a switch, collocation, and obtaining UNE loops.⁸⁷ In other words, even if PRTC could provision timely, cost-effective cross connects in sufficient volume, which the record indicates it cannot, switch deployment could only be justified by CLEC market penetration numbers that far exceed levels achieved by any CLEC in Puerto Rico. Simply put, the record plainly establishes the existence of economic barriers - - separate and distinct from the operational barriers already addressed - - that are sufficient to demonstrate impairment on a granular basis in Puerto Rico.

4. Competitors Are Impaired Without UNE Access to High Capacity Transport and Loops in Puerto Rico.

Once competitors in Puerto Rico are able to successfully obtain the collocation and hot cuts necessary to deploy their own switches in Puerto Rico, they will still have no option but to rely upon PRTC interoffice transport and high capacity loops to provide services to customers. Under even the best-case scenario, a CLEC switch owner has only two potential alternatives for obtaining transport in Puerto Rico: PRTC or Centennial. However, as discussed, Centennial is collocated in only very few PRTC offices. Moreover, it is entirely unclear whether Centennial is willing or able to provide transport to another CLEC and, if so, whether PRTC has the systems, procedures and processes in place to facilitate the cross connections of facilities among CLEC carriers in its central offices.

In most instances, it is highly unlikely that Centennial will even have facilities to serve a particular route. In instances where there is no competitive alternative, WorldNet would be compelled to obtain transport from PRTC, which would have no incentive to provide this service swiftly or at a competitive price. Based upon the experiences regarding cross connects and collocation to date, it would appear that PRTC does not have the necessary systems and

⁸⁷ See Wood/Pitkin Rebuttal Testimony at 4 (lines 41-44) & 5 (lines 1-14).

processes in place, nor is it likely PRTC has even contemplated developing such capabilities. Thus, the market in Puerto Rico is far too underdeveloped to expect meaningful high capacity loop and transport deployment until competitors are able to aggregate the customers necessary to justify the significant expense this deployment would require.

As the Commission has recognized, deploying transport and loop facilities is an expensive and time-consuming process.⁸⁸ While this is true throughout the country, the lack of telecommunications support vendors and expertise in Puerto Rico, in addition to the added cost of shipping to the island would, if anything, increase the costs and burdens associated with the deployment of these facilities. Thus, the Commission's findings that competitors are impaired without access to high capacity transport and loops remain true in Puerto Rico and the Commission must act to make these elements available to competitors to promote the development of robust facilities-based competition in Puerto Rico.

5. The Commission Should Immediately Grant The Petition By The Telecommunications Regulatory Board of Puerto Rico Regarding UNE Access to Enterprise Switching.

The interests of upholding Commission processes and the exigencies of the monopolistic telecommunications market in Puerto Rico dictate that the Commission should immediately grant the Board's Waiver Petition regarding enterprise market switching impairment. As discussed, the Board conducted a full investigation, including holding hearings, concerning the level of impairment faced by competitors providing services to enterprise customers without access to UNE switching. The Board also filed a petition with the Commission seeking a waiver of its enterprise switching rules for Puerto Rico. The Board fully complied with the Commission's processes, and the Commission should adopt the findings that resulted from the

⁸⁸ *Triennial Review Order* at ¶ 371.

Board's thorough investigation. Moreover, *USTA II* did nothing to disturb these rules and or the Commission's process for reviewing the *Waiver Petition*.

“ In this context, state commissions are allowed merely to petition the FCC for a waiver of the unbundling order; the FCC has not granted the States authority to make final decisions on such matters as the existence of impairment.”⁸⁹

The Commission should act to grant the *Waiver Petition* immediately. Not only have Puerto Rico's competitive carriers been awaiting such action for 10 months but PRTC is now using its monopoly power in Puerto Rico by threatening to disconnect UNEs from competitive carriers' provision of service to customers with four or more lines (even though the four line carve-out rule does not, and never did, apply in Puerto Rico). The need for Commission action supporting the Board's hard work and preserving minimal amount of competition in Puerto Rico is both warranted and urgent.

IV. CONCLUSION

This is not a difficult case. None less than the Telecommunications Regulatory Board of Puerto Rico has recognized that the telecommunications market in Puerto Rico is years behind the rest of the country and set forth in detail to this Commission a laundry list of operational impairments that requesting carriers face in trying to enter the facilities-based market in Puerto Rico in its *Waiver Petition*. There is only one switch-based competitor in the whole Commonwealth, there is little or no competitive access to UNE-L, and the Incumbent in Puerto Rico has no hot cut ability and in fact has no experience providing basic wholesale cross connects.

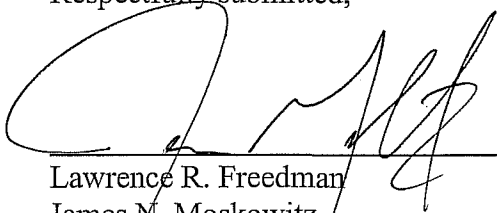
Nor is it likely that PRTC will be able to provision UNE-L in a commercially meaningful way anytime soon. Even the most basic UNE was provided in Puerto Rico less than two years

⁸⁹ *USTA II*, 359 F.3d at 587.

ago and provisioning and billing problems still remain to the point that high cap UNE-P has never existed in Puerto Rico. Moreover, the first collocation in Puerto Rico was completed less than a year ago after a tortured three-year history of stops and starts and intransigence by PRTC.

The record clearly demonstrates that competitors are impaired without access to both mass market and enterprise switching, transport and high capacity loops in Puerto Rico. For these reasons, the Commission must act to keep these elements available in Puerto Rico at market-opening TELRIC rates.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'L. Freedman', is written over a horizontal line.

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ATTACHMENTS

1. Affidavit of Robert W. Walker (FCC CC Doc. Nos. 01-338, 96-98, 98-147)
2. Affidavit of David Bogaty (FCC CC Doc. Nos. 01-338, 96-98, 98-147)
3. Bogaty Direct Testimony (TRB of Puerto Rico, Case No. JRT-2003-CCG-0004)
4. Centennial Response to Board Initial Information Request II.2 (TRB of Puerto Rico, Case No. JRT-2003-CCG-0004)
5. Bogaty Rebuttal Testimony (TRB of Puerto Rico, Case No. JRT-2003-CCG-0004)
6. Walker Rebuttal Testimony (TRB of Puerto Rico, Case No. JRT-2003-CCG-0004)
7. WorldNet Response to Supplemental Board Interrogatory No. 14 **(redacted)** (TRB of Puerto Rico, Case No. JRT-2003-CCG-0004)
8. WorldNet Response to Initial Board Interrogatory No. 17 **(redacted)** (TRB of Puerto Rico, Case No. JRT-2003-CCG-0004)
9. Wood/Pitkin Rebuttal Testimony (TRB of Puerto Rico, Case No. JRT-2003-CCG-0004)